(1) Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

MICHAEL D. MILLER,

Petitioner,

vs.

JIM ALLEN, Individually, TOM DIXON, Individually, STANTON GIDEONS, JR., Individually, BILLY RUTTER, Individually, JOHN STEPHENS, Individually, SUMTER COUNTY, FLORIDA, CASSIE BROWN and CHARLES R. BROWN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT W. SMITH, Esquire
Counsel of Record
430 North Mills Avenue
Suite 1000
Orlando, Florida 32803
(407) 843-3400
Attorney for the Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

In holding that Sumter County did not violate the Petitioner's procedural due process rights because he did not pursue available state remedies, whether the Court of Appeals:

1) applied the wrong legal standard, in conflict with the decisions of this Court, by failing to determine that the loss of the Petitioner's mineral rights and mine operating permit rights did not constitute the loss of a constitutionally protected property interest; and

2) created conflict with the decisions of other Courts of Appeals on analogous facts.

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PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the district court which granted the defendants' motions for summary judgment is not reported, and is reprinted in the appendix at App. 5. The panel opinion of the United States Court of Appeals for the Eleventh Circuit is not reported and reprinted in the appendix at App. 1. The order of the Court Appeals denying rehearing is not reported and is reprinted in the appendix at App. 4.

JURISDICTION

The Court of Appeals entered its judgment on May 28, 1998 (App. 1). The petitioner's timely petition for rehearing was denied on July 13, 1998 (App. 4). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, United States Constitution, provides in relevant part: " . . . Nor shall any state

deprive any person of life, liberty or property, without due process of law. . . . "

Section 1983, Title 42, United States Code, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen in the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

1. The Proceedings Below.

The petitioner filed suit in the United States District Court for the Middle District of Florida in May of 1996 for substantive due process and procedural due process violations pursuant to the Fourteenth Amendment to the United States Constitution. The petitioner claims the loss of his recorded mineral rights and his rights as the mine operator under a mine operating permit issued by the respondent, Sumter County, Florida. The respondent Sumter County transferred his interest as the mine operator under the subject mine operating permit to third parties in August of 1994. This was done in secrecy, without any notification to or knowledge thereof being accorded to the petitioner. He did not discover this loss of his rights until sometime in 1995.

The divestiture of the mineral rights and the rights as the mine operator under the subject mine operating permit form the basis of the substantive due process claim. The involuntary transfer by Sumter County of these rights, which was performed without any notice or opportunity to be heard, provides the grounds for the procedural due process claim. Because the rights under the mine operating permit and, consequently, the recorded mineral rights are involved, the petitioner suffered the loss of a constitutionally protected property interest. It is an interest in real estate.

In granting summary judgment for the respondents, the trial judge ruled that the petitioner did not have a constitutionally protected property interest. He ruled that because of this the petitioner was required to and did not exhaust state remedies which he had otherwise available to him. This would have been an action in state court for declaratory or injunctive relief, or both. The trial judge also ruled that the county defendants did not take any substantive rights from the petitioner.

The Eleventh Circuit Court of Appeals affirmed, holding that the petitioner was required to exhaust state remedies before filing suit in Federal Court. This inherently means that the Eleventh Circuit Court of Appeals did not find that the petitioner had a constitutionally protected property interest. The Eleventh Circuit also held that the petitioner did not have anything taken from him by Sumter County.

2. The Facts.

In March of 1992 the petitioner acquired by recorded warranty deed the mineral rights for certain real property in Sumter County, Florida. At the same time the petitioner acquired the rights as the mine operator in and to a duly issued mine operating permit by Sumter County, Florida for the same real property. In conjunction with obtaining these interests the petitioner invested the approximate sum of $85,000.00 for the permit and various additional permits, agreements, deeds, and releases which were necessary to commence mining operations.

The nature of a mine operating permit is that it is the ultimate grant of permission by the governing body to extract minerals from beneath the surface of the ground. Without the permit one simply cannot mine. With the loss of the mine operating permit you no longer have your mineral rights.

Regulation of subsurface mining in Florida is in three areas. The Department of Environmental Protection (DEP) regulates the reclamation process or restoration of a mined area once mining is complete. The water management districts, in this case the Southwest Florida Water Management District (SWFMD), regulate management of ground water and mining in wetland areas. The various counties in Florida regulate the right to mine. Whether one is permitted to mine or not is subject to a county's control.

The governing ordinance of Sumter County provides that no person shall operate a mine or conduct mining operations without a mine operating permit which is issued only by Sumter County. Sumter County, through

its county commissioners, has the final policy making authority with respect to all county issued mine operating permits.

The mineral that lies beneath the surface of the subject property is limerock. Mine operating permits for limerock are difficult to obtain. There are only five such limerock mine operating permits that have been issued since the adoption of the 1990 comprehensive mining ordinance by Sumter County. This includes the mine operating permit in question.

In August of 1994 Sumter County unlawfully transferred the petitioner's interest in the subject mine operating permit to the Respondents Brown. This divested him of his mineral rights. This was done by Sumter County without any notice to him or by obtaining any consent or authorization from him. The petitioner did not discover that this action had been taken until February of 1995 even though he had identified himself to the County as the permit holder on numerous occasions.

At the Sumter County commission meeting on February 7, 1995 a court reporter was present who transcribed part of the meeting. The transcript shows that in response to a question as to whether Mr. Miller (the petitioner herein) was the authorized operator under the subject mine operating permit, Mr. Glenn Nelson, the Sumter County Director of Planning, Zoning and Building stated that " . . . he thinks that Mr. Miller's contention was that they were not. He (petitioner) has repeatedly asked us to shut them down because they weren't the authorized operator. Eventually we asked the Browns through the provision in the mining ordinance to give us a letter

stating that they were both the owner and operator, more or less to try to resolve that issue, as far as we were concerned, which they did. So as of this date, we look at the Browns as both the owner and operator."

This recitation provided the first indication to the petitioner that his interest in the mine operating permit had been taken from him and transferred to the Browns. Accordingly, his interests were misappropriated, without his knowledge, and given by Sumter County to the Respondents Brown. The petitioner asserts that these acts constitute procedural and substantive due process violations of the Fourteenth Amendment to the United States Constitution and, consequently, of 42 U.S.C. Sec. 1983.

REASONS FOR GRANTING THE PETITION

By holding that the petitioner suffered no procedural due process violation because he did not exhaust available state remedies, the Eleventh Circuit Court of Appeals necessarily held that the petitioner never had a constitutionally protected property interest. If such an interest is lost, one is not required to exhaust state remedies. He may proceed immediately to Federal Court to assert appropriate constitutional relief because of the loss of the protected interest. *McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994).

The substantive component of the due process clause of the Fourteenth Amendment protects individuals against certain government actions regardless of the fairness of the procedures used to implement them. *Collins v. City of Harker Heights,* 503 U.S. 115, 112 S.Ct. 1061, 117

L.Ed.2d 261 (1992); *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). The focus is on the nature of the right lost. If it is a constitutionally protected property interest, under the substantive component of the due process clause, then it is not necessary for a complaining party to exhaust state remedies or go to state court.

The analysis of what constitutes a constitutionally protected property interest under the due process clause in the various circuits supports the contention of the petitioner herein that he had such a property interest. The following have been held to constitute protected interests: a driver's license in *Scott v. Williams*, 924 F.2d 56 (4th Cir. 1991); a possessory interest in real property in *Dunbar Corp. v. Lindsey*, 905 F.2d 754 (4th Cir. 1990); possession and ownership of personal property in *Davis v. Bayless*, 70 F.3d 367 (5th Cir. 1995); a state liquor license in *Brookpark Entertainment v. Taft*, 951 F.2d 710 (6th Cir. 1991); a fee simple interest in land in *River Park Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994); a leasehold interest in trade fixtures in *Gentry v. Lee's Summit*, 10 F.3d 1340 (8th Cir. 1993); new license tags for coin operated games of skill in *Wedges/Ledges of California v. City of Phoenix, Arizona*, 24 F.3d 56 (9th Cir. 1994); an airman's certificate owned by a helicopter pilot in *Tur v. Federal Aviation Administration*, 4 F.3d 766 (9th Cir. 1993); pawned property in pawnshops in *Winters v. Board of County Commissioners*, 4 F.3d 848 (10th Cir. 1993).

Mine operating permits and mineral rights are considered constitutionally protected interest within the meaning of the Fifth Amendment. *Whitney Benefits, Inc. v. U.S.*, 926 F.2d 1169 (Fed. Cir. 1991); *United Nuclear Corp. v. U.S.*, 912 F.2d 1432 (Fed. Cir. 1990); *Yuba National*

Resources v. U.S., 821 F.2d 638 (Fed. Cir. 1987); *Florida Rock Industries v. U.S.*, 791 F.2d 893 (Fed. Cir. 1986).

The judgment of the Eleventh Circuit Court of Appeals sought to be reviewed herein is in obvious conflict with the foregoing decisions. It is erroneous.

As to the holding that Sumter County did not transfer the county issued mine operating permit to third parties (respondents Brown), that is inherently impossible to establish. This is a county issued permit. Only the county can involuntarily revoke it or transfer it. Others can not do this. This was not a voluntary act of the petitioner.

What Sumter County did in taking the petitioner's rights from him and giving them to the Browns amounted to arbitrary and capricious action. The county had no valid state or county interest to advance by doing this. It bore no relationship to Sumter County's health, safety or welfare.

CONCLUSION

It is respectfully requested that this petition for writ of certiorari be granted.

Respectfully submitted,

ROBERT W. SMITH, ESQUIRE
Florida Bar No. 129565
430 North Mills Avenue
Suite 1000
Orlando, Florida 32803
(407) 843-3400
Attorney for the Petitioner

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DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-3164

D. C. Docket No. 96-104-CIV-OC-10C

MICHAEL D. MILLER,

Plaintiff-Appellant,

versus

JIM ALLEN, individually,
TOM DIXON, individually, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(Filed May 28, 1998)

Before COX and BLACK, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

Appellant Michael Miller brought this action pursuant to 42 U.S.C. § 1983, alleging that Sumter County, Florida, and five members of the Sumter County Board of Commissioners in their individual and official capacities[1]

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[1] The district court dismissed the official capacity claims against the individual members of the Sumter County Board of Commissioners as redundant.

(collectively the County Defendants) violated his Fourteenth Amendment substantive and procedural due process rights. He also alleged a state law conversion claim against two private individuals, Charles and Cassie Brown (the Browns). Appellant claimed to have been deprived of the following property rights: (1) his rights under a mining permit issued by Sumter County; and (2) his right to minerals on the Browns' property.

On cross-motions for summary judgment, the district court granted judgment in favor of the County Defendants on Appellant's substantive and procedural due process claims, and declined to exercise supplemental jurisdiction over Appellant's remaining state law conversion claim. The district court ruled in favor of the County Defendants on Appellant's substantive due process claim on two alternative grounds: (1) the County Defendants did not take any affirmative action to deprive Appellant of any rights – any deprivation was caused by the Browns, who were private actors; and (2) alternatively, any affirmative action of the County Defendants was non-legislative conduct that deprived Appellant of state-created rights only and therefore did not give rise to a substantive due process claim. With respect to Appellant's procedural due process claim, the district court granted judgment in favor of the County Defendants because adequate state post-deprivation remedies are available for Appellant to pursue.

Miller appeals the district court's decision on his substantive and procedural due process claims. Upon review of the record, we find no error. As to Appellant's substantive due process claim, any deprivation of his property rights was due to the actions of the Browns, not

the County Defendants. The Due Process Clause does not require the state to protect the property of its citizens against invasion by private actors. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1003 (1989). The district court also did not err in granting summary judgment in favor of the County Defendants on Appellant's procedural due process claim. Adequate state remedies are available for Appellant to pursue. Accordingly, Appellant's procedural due process rights have not been violated.[2] *McKinney v. Pate*, 20 F.3d 1550, 1562 (11th Cir. 1994).

AFFIRMED.

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[2] Because we affirm the district court on these grounds, we need not consider the alternative bases for the district court's ruling.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MICHAEL D. MILLER,
Plaintiff,

-vs-

JIM ALLEN, etc., et al.,

Defendants.

CASE NO.
96-104-Civ-Oc-10

ORDER

This action is brought pursuant to 42 U.S.C. § 1983 and alleges in Count One a violation of the Plaintiff's Fourteenth Amendment substantive and procedural due process rights by Sumter County and five members of the Sumter County Board of Commissioners in their individual capacities ("County Defendants").[1] Count Two is a state law claim of conversion brought against two individuals, Charles and Cassie Brown ("the Browns"). The case is before the Court on cross motions for summary judgment (Docs. 31 and 40). The Court has determined that the County Defendants' motion for summary judgment should be granted as to Count One of the Plaintiff's Complaint, and that Count Two – the state law claim – should be dismissed without prejudice.

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[1] The Court previously dismissed the Plaintiff's Complaint to the extent that the Commissioners were dismissed in their official capacity (Doc. 19).

1. FACTUAL BACKGROUND

The Browns are the owners of a 102-acre property located in Sumter County used as a lime rock mine. On April 12, 1991, the County Defendants issued a Vested Mine Registration and Operating Permit to the Browns as property owners, and to Albert Bori d/b/a Central Florida Excavating as the mine operator (see Exhibit A, Doc. 31). In accordance with Sumter County Ordinance 90-12, ("mining ordinance"), the provisions of the permit state that it is issued jointly to the property owner and designated mine operator, and that a change in the owner or operator shall be reported to Sumter County in writing within 30 days of such change. (See Doc. 41, Exhibit P). The mining ordinance does not require approval of the change in owner or operator, it simply requires notification.

In September, 1991, shortly after the issuance of the mining permit, it appears that the Browns were in default with respect to their obligations under the terms of an outstanding mortgage on the subject property. They then entered into an agreement with the Plaintiff Miller under which Miller paid $12,000 to the Browns to be used to cure the default under the mortgage. In return, the Browns gave Miller a Bill of Sale for the lime rock which had already been mined as well as an option to purchase the property or lease it for the excavation of lime rock.

From September 1991 through June 1992, the Plaintiff, through various corporations he controlled, entered into agreements with Albert Bori to transfer all of Bori's rights as mine operator; with CSX Railroad to obtain a right of access to the mine; and with the Southwest

Florida Water Management District to obtain other required permits to operate the mine. The Plaintiff also exercised his option and entered into an excavation lease as well as a purchase and sale of minerals and mineral rights agreement with the Browns. In March of 1992, the Plaintiff first notified the County Defendants that he had become the listed mine operator of the property.

Mine operations began in June of 1992 and continued until August 1992, at which time business dealings between the Plaintiff and the Browns broke down. The Browns filed suit against the Plaintiff in state court, and from that point on the Plaintiff was denied access to the mine and the mine's operations. The cause of action was eventually dismissed for failure to prosecute.

In February of 1993 and again in January of 1994, the Plaintiff sent letters to the Planning, Zoning, and Building department of Sumter County giving notice that persons other than those designated on the mining permit were operating the mine. He requested cancellation of the mining permit on that basis. The County Defendants never responded to these letters. The Plaintiff then appeared at a public meeting of the County Defendants and complained about the mine operations. At this meeting the County Defendants stated that they would not become involved in the dispute over the operation of the mine. The County Defendants then sent a letter to the Browns on July 26, 1994, requesting that the Browns provide written notification concerning the identity of the current owners and operators of the mine. In August of 1994, the Browns notified the County Defendants that they were the sole owners and operators of the mine, and from that point on, the County Defendants treated the

Browns as such. The County Defendants never contacted or notified the Plaintiff of these circumstances.

The Plaintiff appeared at a third public meeting of the County Defendants on February 7, 1995 and again claimed that unauthorized parties were operating the mine. The County Defendants stated that the Browns were the designated mine operators and refused to hear the Plaintiff's complaints. Mining operations continued on the property until the permit was suspended in February of 1995 by the County Defendants due to a finding that the terms of the permit had been violated. The Plaintiff then filed this action against the County Defendants and the Browns. The County Defendants' failure to cancel the mining permit and the continued issuance of blasting permits form the basis of Count I of the Plaintiff's complaint. The Browns' alleged conversion of the mining permit forms the basis of Count II.

II. STANDARD FOR SUMMARY JUDGMENT

The entry of summary judgment is appropriate only when the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). In applying this standard, the Court must examine the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits and other evidence in the record "in the light most favorable to the non-moving party." *Samples on Behalf of Samples v. Atlanta*, 846 F. 2d 1328, 1330 (11th Cir. 1988). The moving party bears the initial burden of establishing the nonexistence of a triable fact issue. *Celotex Corp. v. Catrett*, 477

U.S. 317, 106 S.Ct. 2458, 91 L.Ed.2d 265 (1986). If the movant is successful on this score, the burden of production shifts to the non-moving party who must then come forward with "sufficient evidence of every element that he or she must prove." *Rollins v. Techsouth*, 833 F.2d 1525, 1528 (11th Cir. 1987). The non-moving party may not simply rest on the pleadings, but must use affidavits, depositions, answers to interrogatories, or other admissible evidence to demonstrate that a material fact issue remains to be tried. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553.

III. PLAINTIFF'S AND COUNTY DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

The first motion for summary judgment was filed by the Plaintiff and addresses the issue of liability only. In his motion, the Plaintiff argues that no genuine issues of material fact remain in dispute and that he is entitled to judgment as a matter of law on all of his claims. The County Defendants have responded and present several arguments against the motion: first, that they did nothing which interfered with or otherwise amounted to a "taking" of any property right possessed by the Plaintiff; second, that the Plaintiff is not entitled to summary judgment on his substantive due process claim because any property rights he possessed arose out of state law, not the constitution; third, that the Plaintiff is not entitled to summary judgment on his due process claim because adequate state post-deprivation remedies were available; and fourth that the County Defendants are not liable in

their individual capacities because of the doctrine of qualified immunity.

The second motion for summary judgment was filed by the County Defendants (Doc. 40). The Plaintiff has filed a timely response (Doc. 50). The County Defendants present a number of arguments in their motion, three of which are identical to those raised in their response to the Plaintiff's motion for summary judgment. In addition, the County Defendants assert that the Due Process Clause does not require state actors to protect against deprivations by private actors.[2]

A. Substantive Due Process Violation

The Plaintiff argues that the County Defendants violated his due process rights by taking the Plaintiff's right to mine the property and giving it to the Browns.[3] The Plaintiff contends, more specifically, that a deprivation by the County Defendants occurred when the County Defendants sent a letter to the Browns in July of 1994 requesting that the Browns clarify the status of the mining permit. The Plaintiff argues that the act of sending this

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[2] Because the Court can dispose of both motions for summary judgment on the basis of these arguments, the Court will not address the County Defendants' other contentions relating to standing and to the question of whether a "taking" occurred.

[3] The Court notes that the Plaintiff repeatedly uses the term "takings," but has not presented any claim of a taking without just compensation. Therefore, the Court will focus on the due process claims.

letter to the Browns, coupled with the County Defendants' treatment of the Browns as both the owner and operator of the mine upon receipt of the Browns written notification, constitutes affirmative, non-passive action on the part of the County Defendants which deprived the Plaintiff of his vested right to mine the property. The facts clearly show that this argument is untenable. The County Defendants did not take any affirmative action to deprive the Plaintiff of any rights. All the County Defendants did was send a letter requesting clarification and took notice of the Browns reply. The letter was sent as a result of the Plaintiff's own exhortations, and no action of any kind was taken by the County Defendants to prevent the Plaintiff from exercising, or attempting to exercise, any mining or other property rights the Plaintiff may have had as a consequence of his dealings with the Browns.

The mining ordinance provides that any changes in the identify of the mine owner or operator must be reported to the County Defendants within 60 days of the change. (Doc. 47, Exhibit 2). However, it is important to note that neither the mining ordinance nor the permit require the approval of the County Defendants as a precondition to the change in ownership or operation. The County Defendants need only take notice of the change. (Doc. 47, Exhibit 1, paragraph 10, Exhibit 2). This is in contrast to various other provisions in the mining ordinance which require the County Defendants to approve any changes or expansions to the mine itself. (See Doc. 41, Exhibit P).

The Plaintiff has failed to offer any evidence that the County Defendants ever took possession of the property or otherwise converted any property rights alleged to

have been owned by the Plaintiff. It is undisputed that the only permit the County Defendants issued during the relevant time period was the permit dated April 12, 1991. The County Defendants never revoked or amended the permit, and never issued anything to the Plaintiff. The action resulting in the Plaintiff's alleged deprivation was taken by the Browns. It was the Browns who originally contracted with the Plaintiff to give him a right to operate the mine. It was the Browns who filed suit against the Plaintiff when relations broke down. And it was the Browns who sent the letter to the County Defendants stating that the Browns were both owners and operators of the mine. The County Defendants, on the other hand, stated publicly that they would not get involved in the Plaintiff's dispute with the Browns. Instead, the County Defendants simply acted pursuant to their mining ordinance, treating the Browns as owners and operators in accordance with their written notification.

Because the County Defendants did not commit a taking of the Plaintiff's property rights, any deprivation that occurred was on the part of private actors, i.e., the Browns. In fact, the Plaintiff's entire claim centers on a contract dispute between the Plaintiff and the Browns. As such, the Plaintiff's claims against the County Defendants fail under the doctrine stated in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189; 109 S.Ct. 998; 103 L.Ed.2d 249 (1989).

In *DeShaney*, the petitioner filed a § 1983 claim against the County Department of Social Services alleging a violation of his substantive due process rights for failing to remove the petitioner from his father's custody.

The County Department had received numerous complaints about the father who had severely beaten the petitioner on several occasions. *Id.* at 189. In affirming summary judgment for the County Department, the Supreme Court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. The purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196. Therefore, the failure to protect the petitioner from his father's violence did not constitute a substantive due process violation.

The *DeShaney* doctrine governs this case. The County Defendants are responsible for overseeing mining operations in Sumter County and they received numerous complaints from the Plaintiff regarding the status of the mine operator. The County Defendants did not take action. As in *DeShaney*, the County Defendants in this case cannot be held liable for this inaction; any deprivation of mining rights suffered by the Plaintiff was due strictly to actions by the Browns. The County Defendants' failure to protect the Plaintiff against the acts of the Browns "simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

The Plaintiff argues that *DeShaney* does not apply to his claim since its facts centered around a child custody issue. While *DeShaney* may be factually dissimilar to this case, its underlying doctrine clearly applies. While the Due Process Clause prevents the State itself from depriving persons of property interests, it cannot "impose an affirmative obligation on the State to ensure that those

interests do not come to harm through other means." *Id.* at 195. The County Defendants' motion for summary judgment is due to be granted on this issue.

Assuming arguendo that *DeShaney* did not apply, the Plaintiff's substantive due process claim would still fail for another reason. The County Defendants argue that any rights possessed by the Plaintiff are state created property rights which cannot form the basis of a substantive due process claim. The Court agrees and is inclined to deny the Plaintiff's motion for summary judgment and to grant the County Defendants' motion for summary judgment on this issue.

It is well established that land use rights as property rights "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); *DeKalb Stone, Inc. v. County of DeKalb*, 106 F.3d 956, 959 (11th Cir. 1997). Because land use rights are state-created rights, they are "not entitled to substantive due process protection under the Due Process Clause because 'substantive due process rights are created only by the Constitution.' " *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) *cert. denied*, 513 U.S. 1110, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995) (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985) (Powell, J., concurring)); *DeKalb*, 106 F.3d at 959.

Furthermore, the enforcement of existing policies and regulations can be classified as an executive act, rather than legislative. Executive acts normally apply to a small number of persons, often to only a single individual. They typically arise "from the ministerial or administrative activities of members of the executive branch." *McKinney*, 20 F.3d at 1557, n.9. Legislative acts, however, usually apply to large segments of society, and involve "policy-making rather than mere administrative application of existing policies." *Crymes v. DeKalb County*, 923 F.2d 1482, 1485 (11th Cir. 1991) (holding that enforcement of existing zoning regulations is an executive act).

The Eleventh Circuit has previously held that a plaintiff did not present a substantive due process claim when he alleged an executive deprivation of a state-created right. *McKinney*, 20 F.3d 1550. In *McKinney*, an employee alleged that the county arbitrarily and capriciously deprived him of his substantive due process right to employment when he was fired. *Id.* at 1554-55. The Court held first that any property interest in employment was a state created right. *Id.* at 1556. Next, the Court found that the action by the county against the individual plaintiff was an executive act. *Id.* at 1557, n.9. Lastly, the Court held that the deprivation of state created rights via non-legislative acts are only subject to procedural due process protections because substantive due process extends only to rights created by the Constitution. *Id.*

Although the facts of *McKinney* involved state employment law, the implication of its holding is that it applies to all executive acts involving state created rights. See *Boatman v. Town of Oakland*, 76 F.3d 341 (11th Cir. 1996) (holding where a property owner alleged that town

executives arbitrarily and capriciously refused to issue a certificate of occupancy, no substantive due process claim had been stated); *see also Kantner v. Martin County*, 929 F. Supp. 1482, 1486-87 (S.D. Fla. 1996) ("The Court finds that *McKinney* is applicable to zoning decisions since the rights created in the zoning context arise under state law rather than the Constitution."); *Sullivan Properties, Inc. v. City of Winter Springs*, 899 F. Supp. 587, 596-96 (M.D. Fla. 1995) (holding that "[t]he source of all zoning regulations is state law and local ordinances, not the Constitution," which are "protected only by the procedural component of the Due Process Clause.")

Given the applicable caselaw, the Plaintiff cannot present a viable substantive due process claim. Any rights the Plaintiff has as the listed mine operator have been created by state law. Indeed, it is the mining ordinance itself which establishes the right to mine as "vested." (See Doc. 41, Exhibit P). In addition, the County Defendants' actions fall within the category of executive acts and their alleged failure to revoke the mining permit applied to only a limited number of individuals: the Browns and the Plaintiff. The County Defendants were not establishing new policy; if anything they were applying an existing ordinance to the situation before them. Therefore, the alleged deprivation of the Plaintiff's state-created mining rights by an executive act of the County Defendants – even if such a deprivation occurred – cannot constitute a substantive due process violation. To the extent that the County Defendants seek summary judgment on this issue, its motion is due to be granted.

B. Procedural Due Process Violation

The Plaintiff contends that his right to operate the mine was taken away without any notice or opportunity to be heard, thus depriving him of his property right without due process of law. The County Defendants argue in response that the Plaintiff's claim is insufficient because he failed to take advantage of the post-deprivation remedies provided by the state. The Plaintiff has failed to show that he has exhausted the remedies available to him before filing this action, and therefore, the County Defendants' motion for summary judgment as to the procedural due process claim is due to be granted.

The Eleventh Circuit has previously held that "procedural due process violations do not become complete 'unless and until the state refuses to provide due process' " *McKinney*, 20 F.3d at 1562 (quoting *Zimermon v. Burch*, 494 U.S. 113, 123, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990)). A state may provide a post-deprivation remedy to cure any procedural defects in the deprivation; it is only when the state refuses to provide such a post-deprivation remedy that a violation sufficient to support a claim under 42 U.S.C. § 1983 arises. *McKinney*, 20 F. 3d at 1557. Thus, even if the Plaintiff had suffered a procedural deprivation by the County Defendants, "he has not suffered a violation of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation." *Id.* at 1563.

In the Plaintiff's case, the State of Florida has provided various causes of action, none of which the Plaintiff

has pursued.[4] The Plaintiff could have instituted an action for injunctive relief, requesting that the Browns be enjoined from operating the mine until the dispute over status of the mine operator was adjudicated. Florida courts have previously entertained suits for injunctive relief where third parties attack the validity of existing building permits, or seek to enjoin the issuance of a building permit. *See Fortunato v. Coral Gables*, 47 So. 2d 321 (Fla. 1950); *Dowd v. Monroe County*, 557 So. 2d 63 (Fla. Dist. Ct. App. 1990), *cause* dismissed, *Popplewell v. Dowd*, 564 So. 2d 488 (Fla. 1990). The Plaintiff also could have instituted a state action for declaratory judgment as to his rights as the listed mine operator. Florida courts have upheld declaratory judgment actions as a means to seek clarification or adjudication of rights of property owners under municipal ordinances and to obtain relief from the actions of zoning authorities. *Donaldson v. Titusville*, 345 So. 2d 800 (Fla. Dist. Ct. App. 1977). Any property rights the Plaintiff held as mining operator clearly fall within the same category as other land use and zoning rights. These two post-deprivation remedies were more than adequate to provide the Plaintiff relief.

The "exhaustion doctrine" in *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) which the Plaintiff relies on does not apply in this case. The

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[4] In addition to the injunctive and declaratory relief discussed infra, the County Defendants argue that petitions for certiorari or mandamus were also available to the Plaintiff as post-deprivation remedies. The facts provided are not clear as to whether either remedy would be sufficiently adequate. However, the Court need not address that issue given that other adequate remedies exist.

Supreme Court held in *Patsy* that plaintiffs were not required to avail themselves of available state remedies before suing in federal court. *Id.* at 2560-2566. However, the Court's holding presupposed the existence of a valid constitutional claim. In this case, the Plaintiff cannot establish a valid constitutional claim under 42 U.S.C. § 1983 because his procedural due process rights were not violated where adequate state postdeprivation remedies clearly existed. *See, McKinney,* 20 F.3d at 1564, n.20. The exhaustion doctrine is irrelevant to this case. Since the Plaintiff had an adequate state remedy available in the form of injunctive or declaratory relief which he did not pursue, his motion for summary judgment on his procedural due process claim is denied, and the County Defendants' motion is due to be granted.[5]

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[5] The Court's earlier ruling on a motion to dismiss is not dispositive with regard to a motion for summary judgment. The Court shall not dismiss a complaint unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of [her] claim that would entitle [her] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). Moreover, in drafting a complaint, it "is sufficient if it shows that the plaintiff is entitled to *any* relief which the court can grant, regardless of whether it asks for the proper relief." *Dotschay v. National Mut. Ins. Co.,* 246 F.2d 221 (5th Cir. 1957). *Conley,* On the other hand, the party opposed to a motion for summary judgment faces a much stricter standard. The nonmovant must come forward with "sufficient evidence of every element that he or she, must prove." *Rollins v. Techsouth,* 833 F.2d 1525, 1528 (11th Cir. 1987). In addition, the nonmovant cannot rest on the face of the pleadings as in a motion to dismiss. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2458, 91 L.Ed.2d 265 (1986).

C. Qualified Immunity

The qualified immunity shield protects government officials performing discretionary functions from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Hutton v. Strickland*, 919 F.2d 1531, 1535-36 (11th Cir. 1990) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 1982)). The doctrine was established by the Supreme Court to protect "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 344-46, 106 S.Ct. 1092, 1097-98, 89 L.Ed.2d 271 (1986); and the official's conduct is to be measured by the "objective legal reasonableness" of the action taken. *Harlow*, 457 U.S. at 819, 102 S.Ct. at 2739. *See also Anderson v. Creighton*, 483 U.S. 635, 638-39, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

In undertaking the decision making process concerning the issue of qualified immunity, the Defendant must first establish that he was acting within the scope of his discretionary authority as an official of the state when the allegedly wrongful acts occurred. The burden then shifts back to the Plaintiffs to show the Defendant violated clearly established law in committing those acts. *Hartsfield v. Lemacks*, 50 F.3d 950, 953 0 1th Cir. 1995); *Hutton*, 919 F.2d at 1537 (citing *Rich v. Dollar*, 841 F.2d 1558 11th Cir. 1988) and *Hudgins v. City of Ashburn*, 890 F.2d 396 11th Cir. 1989)).

The Court agrees with the County Defendants that they were acting within the course and scope of their discretionary authority as County Commissioners. As

stated in the mining ordinance, the County Defendants are authorized to issue mining permits, and to review, amend, or revoke them for non-compliance. By not prohibiting the Browns from mining their property and by refusing to reinstate the Plaintiff as the mine operator, the County Defendants exercised their discretionary supervisory authority over mining in Sumter County.

The Court also agrees with the County Defendants that they did not violate clearly established principles of law. They merely followed their own procedures as set out in the mining ordinance. When they received written notice that a change in the owner or mining operator on Sumter County property had taken place, the Commissioners simply took notice of the change. There is no provision in the mining ordinance that required the County Defendants to become involved in what was essentially a private contract dispute. They were not required to look beyond the face of the written notification, and thus did not violate any established principles of law. On a more broader view, the County Defendants also did not violate clearly established principles of due process. For the reasons given above, the County Defendants were under no obligation to protect the Plaintiff from the acts of the Browns. Therefore, the County Defendants motion for summary judgment on the issue of qualified immunity is also due to be granted.

IV. DEFENDANTS CHARLES AND CASSIE BROWN

The Court's subject matter jurisdiction over Count Two, the state common law claim of conversion, is predicated on the supplemental jurisdiction of 28 U.S.C.

§ 1367(a) (codifying *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)). (Doc. 11). However, supplemental jurisdiction is discretionary,[6] and a district court may decline to exercise jurisdiction under § 1367(a) if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3); *see also Gibbs*, 383 U.S. at 726. Plaintiff's federal law claims having been dismissed, the appropriate forum for his Count Two claim is in the courts of the state under whose law the alleged acts and omissions are claimed to be actionable. Therefore, the Court will dismiss without prejudice Count Two.[7]

V. CONCLUSION

Accordingly, upon due consideration and for the reasons stated above, it is ordered that:

1) The Plaintiff's motion for summary judgment for liability against the County Defendants and the Browns (Doc. 31) is DENIED.

2) The County Defendants' motion for summary judgment (Doc. 40) as to Count One is GRANTED and the Clerk is directed to enter judgment in favor of the County Defendants and against the Plaintiff as to Count One.

3) Pursuant to 28 U.S.C. § 1367(c)(3), the Plaintiff's complaint is DISMISSED without prejudice as to Count

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[6] *Faucher v. Rodziewicz*, 891 F.2d 864, 871 (11th Cir. 1990) (citing *Gibbs*, 383 U.S. at 726).

[7] "If the federal claims are dismissed prior to trial, Gibbs [sic] strongly encourages or even requires dismissal of the state claims." *Faucher*, 891 F.2d at 871 (citing *L.A. Draper and Son v. Wheelabrator Frye, Inc.*, 735 F.2d 414 (11th Cir. 1984)).

Two, and the Clerk is directed to enter judgment accordingly and close the file.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida, this 4th day of September, 1997.

/s/ William Terrell Hodges
UNITED STATES DISTRICT JUDGE

Copy to counsel of record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-3164

MICHAEL D. MILLER,
Plaintiff-Appellant,

versus

JIM ALLEN, individually,
TOM DIXON, individually, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

(Filed July 13, 1998)

BEFORE: COX and BLACK, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Michael D. Miller, is denied.

ENTERED FOR THE COURT:

/s/ Susan Black
UNITED STATES CIRCUIT JUDGE